consecrate the state, and civilize the church. Such was in substance the state of things in the Roman Republic.

It is time however to bring this desultory article to a close. In dwelling at considerable length upon the recovered fragment before us, we have not only had it in view to make the reader acquainted with this particular work, but have gladly taken the occasion to offer our feeble tribute of applause to the writings and character of the author. We shall feel ourselves well rewarded for our labor, if any of our readers who may be led by this notice to peruse the Republic, should be induced by the profit and pleasure which this study will certainly afford them, to familiarize themselves with the splendid eloquence and sublime philosophy of the Father of his Country.

ART. IV.—*The General Laws of Massachusetts, from the adoption of the constitution to February* 1822, *with the Constitutions of the United States and of this Commonwealth, together with their respective amendments prefixed; revised and published by authority of the legislature, &c. by Asahel Stearns and Lemuel Shaw Esquires, commissioners. Theron Metcalf Esq. Editor.* 2 vols. 8vo. Boston, 1823.

WE congratulate the magistracy and the legal profession in Massachusetts on the appearance of the present revised edition of our statutes. A considerable period has elapsed since the last revision of them, and the necessity of a new one had become very sensibly felt, in consequence of the unwieldly bulk of the acts at large, the difficulty of procuring perfect sets of all the statutes, the confusion arising from having acts public and private, repealed and unrepealed, mingled together without distinction, and many other defects in the mechanical arrangement and form of the old copies, which are remedied in the present edition. It is printed, so far as respects the typographical execution of it, in a style of neatness and liberality, very creditable to the publishers, and with a freedom from errors which can be justly appreciated only by those, who have had actual experience of the difficulties attending any attempt to render such works immaculate. The names of the gentlemen commissioned by the legislature to prepare the

edition for the press, and of the editor whose aid they enjoyed, would be of themselves an adequate pledge to the public that no pains would be spared, nor any qualifications wanting, to ensure for this edition the greatest completeness both in plan and execution. What the commissioners have done, cannot be stated better than in the following extracts from their prefatory notice.

'The resolve of the legislature, under which this edition of the statutes is published, has been the guide of the commissioners in preparing it for the press. It has been their design to insert all public acts of a general nature and applicable to the commonwealth at large, except such as have ceased to affect existing rights, or would not illustrate the history of the law. They have also inserted a few special and private acts, which are of general interest, either from their connexion with public acts, or from the importance of the subjects to which they relate.

'The acts of each legislature have been divided into chapters, and numbered in a regular series from the beginning to the end of each political year. This has been done in chronological order, except in a few instances of acts wholly omitted in former editions, or inserted in the appendix to the second volume of the edition of 1807. These have been placed at the end of the year in which they were enacted, so as not to derange the numbers under which the statutes have heretofore been cited.

'The repealed acts which are retained in this edition, and those parts of acts which are repealed or have otherwise become inoperative, are printed in small type, and the repealing acts indicated by marginal references. At the end of the public acts and of the title of the private acts, reference is made to additional acts on the same subject; and acts enlarging, restraining, or modifying the text, have been referred to in the margin. The amendments to the constitution of the United States* and of this commonwealth have been indicated in a similar manner.

* * * * *

'In addition to the references which were prescribed by the resolve of the legislature, the commissioners have thought proper to refer to the Colony and Province laws on the subjects of the several statutes, that a view of the whole history of our legislation might be readily obtained by those who desire it.

'The title and the text of every act in this edition have been compared with the original rolls in the secretary's office, and all the errors of former editions corrected.

* The thirteenth amendment to the constitution of the U. S. is inadvertently inserted with the others, as is also the case in the edition of the laws of the U. S. published by Bioren and Duane, in 1815. It was not adopted by a sufficient number of the states to become a part of the constitution.

'An analytical index of the contents of this edition has been prepared with considerable care and attention, and added to the second volume.'

We feel confident that the public expectations will not be disappointed in this edition, much as the community had a right to anticipate from it, when they knew its publication was entrusted by the legislature to persons so fully competent for the task as professor Stearns and Mr Shaw. So far as we can judge from the cursory examination which we have been able to bestow upon the two volumes, the execution of them is such as to do justice, in every respect, to the confidence reposed in those gentlemen by the legislature.

The republication of the statutes affords us an occasion, which we have some time desired, of inquiring into the origin, growth, sources, and effects of the most important peculiarities in the laws of Massachusetts, and of the several New England states. Through all these states there is a manifest similarity in their laws, as there is indeed in most of their institutions, in their customs, manners, and in the general tone and character of society and of the people, with the circumstances and causes of which likeness our readers are too familiar to need to be reminded of them in this connexion. As Massachusetts, beside having been the oldest colony, and beside having always retained the precedence in power and population which her start of the rest enabled her to acquire, did once embrace within her territorial limits nearly the whole extent of New England, it follows that the laws of Massachusetts present a fairer example, than can be found in either of her sister New England states, of their departures from the principles and elements of the contemporary laws of England. An examination, therefore, of the rise of these differences in Massachusetts will serve as an illustration, at least, if not as a complete development, of the nature of similar differences throughout this section of the Union. The original settlers of Connecticut, in their individual spirit, and in their public counsels, are almost identified with those of Plymouth and Massachusetts; these last, with Vermont, New Hampshire, and Maine, have in past times constituted the same jurisdiction; and Rhode Island alone, as having been established in the principles of genuine religious freedom, bears a more peculiar stamp on her civil institutions, but not so essentially

peculiar as to prevent her being comprehended in the same class with the other eastern states.

We shall not institute this comparison boastingly, however justly we may pride ourselves upon the improvements, which we have made in this country, upon the common law properly so called,—with whatever emotions of honest exultation we might reasonably point to these improvements. For we apprehend that oftentimes, when professional men among us are bestowing exalted praise upon the common law, they lose sight of the important fact that the common law in England is radically different from the system which bears the same name in America. The common law, properly speaking, is that in which Hale and Holt and Mansfield and Ellenborough adjudicated,—which Coke and Blackstone commented upon,—which upholds England's government by king, lords, and commons,—which marks out the jurisdiction of her courts of chancery, king's bench, common pleas, and exchequer,—which fixes the rules for the descent of property,—which engendered and perpetuates the *rotten borough* principles of representation,—which did authorize the tenure of knight's service with the rest of the antiquated burdens of the feudal system:—for all these things, with a thousand others of the same stamp, are among the peculiar discriminating qualities of the common law, inherent in its very essence, but irreconcileably at war with all our dearest institutions. It is the common law of Virginia, of Massachusetts, of New York, or of Pennsylvania, which Americans must intend when they eulogize the common law; and we unite heart and hand with them in their warmest expressions of veneration for this law, since light does not differ more from darkness, than this does from the common law as flourishing on its native English soil. But without entering, on the present occasion, more particularly into the comparison between the laws and institutions of our country and those of England, in a general view, we proceed to the elucidation of the main inquiry, whence did these well known differences originate? And in the prosecution of this inquiry we confine our remarks to Massachusetts, as well for the reasons before mentioned, and for the preservation of some little unity of design in the present article, as because the subject will be more thoroughly understood with these restrictions, than if we spread out our investigation through the laws of other states.

The first cause, which presents itself, of many of the differences in question, is the charter of incorporation originally granted the colony, and afterwards displaced for the province charter. By virtue of these instruments, and under the express provision of one of them, our representative government was originally established and subsequently confirmed, together with the authority of a governor and of a general court; and the same charters relieved us of the whole system of the feudal tenures, with all their incidents, qualities, principles, and consequences. There is yet another admirable feature in the political institutions of America, of which our charter and the charters of the sister colonies were the original, namely, the prevalence of written constitutions. We stop to mention this fact more particularly, because the idea of these constitutions, which are among the peculiar boasts of our country, and which the French, in imitation of us, and other nations of continental Europe in emulation of France, have been struggling so pertinaciously to obtain and secure, was undoubtedly suggested to our ancestors in consequence of their habitual reference to the colonial and provincial charters for the tenure by which their political rights and immunities were holden. Our constitutions, indeed, differ essentially from the charters in nature, the latter being mere grants of privileges from the crown, whilst the former are a voluntary limitation of their own privileges on the part of persons who recognize no political superior; but the constitutions closely resemble their prototypes in this, that the charters were then, as constitutions are now, a recorded system of fundamental law for the guidance both of the people themselves and of the delegated holders of their authority. And the fact that such was the origin of our constitutions will serve to explain the facility with which they were introduced, the ready acquiescence of the country in their establishment, and the immediate efficaciousness, which they enjoyed when put in operation. For they were not, either in principle or in form, a radical innovation upon the social order, calculated to impress the people unfavorably by their strangeness, or to meet with obstacles to success on account of the novelty of their design. And happy would it be for those nations, which are following our example in this respect, if, instead of having to force their constitutions upon a portion of the body politic that opposes them as adverse to

their prejudices, principles, power, and interests, they had been prepared, like ourselves, to greet constitutions as an old and tried friend reappearing under more imposing auspices.

The next source of difference, to be adverted to, is the local situation of our ancestors, in respect of their condition as an infant colony, separated at a great distance from the parent country, in a desert land, where it would have been absurd to think of carrying into effect all the complicated laws of a powerful, populous, and refined empire. The colonists uniformly considered themselves justified in leaving behind them so much of the laws relative to the constitution of courts of justice, the punishment of offences, the support of established clergy, the artificial refinements and distinctions in the nature of property, and the like, as were wholly inapplicable to their altered circumstances; and the exercise of such a right must obviously have operated as a kind of discretionary power in the rejection of old and the adoption of new rules of conduct, wherever the colonists were of opinion that such a change was expedient or desireable. Under the first charter, this discretion was pretty liberally construed, while the colonists acted independently of the authority of the metropolis; but when the growing boldness of the colonists had attracted the attention of the British ministry to the increased importance of the colony, and the provincial government was established in Massachusetts, the people were made more sensible, as we shall show hereafter, of their dependance on Great Britain. At the time when Massachusetts was colonized, the law with regard to this point was not so well understood in England as it was at a later period. The celebrated case of the *Postnati*, indeed, which decided that, a person born in Scotland after the descent of the crown of England to king James, was entitled to the privileges of a natural born subject in both kingdoms, occured at the period under consideration, and served to put to rest many a *quæstio vexata* concerning the relative legal conditions of inhabitants of different countries united under the same general allegiance. But the questions agitated in this case referred only to the situation of the people of a country conquered by the king of England, or belonging to him by cession, descent, purchase, or possession, previous to his obtaining the crown; and a multitude of illustrious examples, applicable to such a case,

grew out of the numerous fiefs, which the kings of England held at various times in France, and out of the conquest of Wales and Scotland. But the condition of English-born subjects, who emigrated to an uninhabited country, or to a country in the possession of savages, and formed a settlement there, was a case too novel to have yet had its legal operation well ascertained. So late as the reign of William and Mary it was holden that if an inhabited country was discovered and settled by English subjects, all laws in force in England were in force there; and that in case of a country conquered from infidels, their laws continued in force until declared void by the conqueror, unless they were inconsistent with our religion, or enacted any thing that was *malum in se*, or were silent, when the country was to be governed according to the rules of natural equity. These principles were affirmed by the lords of the privy council in 1722, excepting that they considered the laws of the victor as immediately taking effect, wherever those of the vanquished were deficient or abolished, without making any reservation as to the applicability of the laws of the conqueror to the circumstances of the conquered country. But all the cases unite in maintaining, that where an infidel country had been subdued by Englishmen, in which predicament the colonies were regarded, it did not become *ipso facto* subject to the laws of England. Hence it was laid down by sir William Blackstone, that the common law of England, as such, had no allowance or authority in the American plantations belonging to Great Britain. This being the concurrent decision of all the English law-books, it is evident that, although the charter given the colonists required their laws to be consistent with the English, yet, as the charter provided no test of that consistency, the determination of it was necessarily left to the colonists.* And out of these circumstances arose the *common law* of Massachusetts, as explained by chief justice Parsons.†

'Our ancestors,' are his words, 'when they came into this new world, claimed the common law as their birth-right, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus

* See Coke's Rep. pt. viii; Salkeld ii. 411 and 666; Mod. Rep. iv. 215; P. Williams, ii. 75; Blackstone's Com. i. 107.

† Massachusetts Reports, ii. 534. Com. *vs.* Knowlton.

claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people. So much therefore of the common law of England as our ancestors brought with them, and of the statutes then in force amending or altering it; such of the more recent statutes as have been since adopted in practice; and the ancient usages aforesaid, may be considered as forming the body of the common law of Massachusetts.'

In determining what portions of the common law to reject, and what regulations to substitute in their stead, our progenitors were guided partly by the external circumstances, which we have just mentioned, but still more by their own character, by the fact that they were exiles and sufferers for conscience's sake, by the austerity of their moral principles, by the unconquerable spirit of independence, which armed them to endure all afflictions and brave all dangers, with unshaken resolution, in vindication of their inalienable right to worship God according to the dictates of their own consciences. They did not fly to *this outside of the world*, as they forcibly termed it, impelled by mere sordid avarice to dare the perils of untried seas and of untrodden wildernesses. Had they been needy adventurers, actuated only by the love of gain, there might have been copious chapters in their laws for parcelling out the subject territory and its population into *repartimientos*, but there would have been few clauses open to censure for any severity of animadversion against unsound morals or questionable faith. They did not flatter themselves, in their first feeble attempts at a settlement, that they, poor wandering fugitive outcasts, were establishing the foundations of an empire, which, in the swift development of its energies, should soon unite the freshness and elasticity of youthful strength with the refined skill and persevering vigor of mature age. No ambitious projects of conquest, in short, no deep-laid schemes

of commercial speculation, none of the ordinary causes of an overflowing population, or of poverty and infamy at home, conduced to the emigration of our forefathers, but the high and holy motive of devotion to what they esteemed the cause of pure and undefiled religion. Such being the influences, under which they acted, it is not extraordinary that a deep and pervading sentiment of religious enthusiasm controlled the measures of their government; nor is it extraordinary, considering the long series of persecution, by which their feelings had been harrassed and irritated into a state of unnatural violence, that some of their laws should breathe a more intolerant spirit, than a liberal policy could justify in less aggravating circumstances.

The operation of the various causes, to which we have referred, will be most readily discerned, and their influence on our system of jurisprudence best appreciated, by considering what were in substance the colonial laws; an inquiry, which we can the more successfully pursue, inasmuch as these laws formed a code that was complete in itself, unique in its spirit, peculiar in its elements, and sufficiently remarkable to merit the attention of scientific jurists. An examination of it will afford ample illustration of the preceding remarks, at the same time that it will disclose the origin of many of the most important singularities in the existing laws of Massachusetts as compared with those of England.

By the colony charter, the first settlers of Massachusetts were constituted a corporation, with the usual powers of such a body, and with *no others*:—that is, to sue and to be sued as natural persons may; to purchase and hold lands to them and their successors; to have a common seal; and to enact by-laws, which should be binding as to themselves, unless contrary to the laws of the land. They had high privileges, it is true, for private persons;—they enjoyed a temporary exemption from internal taxes and from the customs, and they and their descendants were entitled to all the rights of Englishmen; but they possessed few of the powers essential to the being of an independent state. They had no authority to inflict capital punishments, nor to erect courts for the probate of wills or courts with admiralty jurisdiction, nor to create a house of representatives, nor to levy taxes on the inhabitants, nor to incorporate towns, colleges, parishes, or other like communities.

Now these powers are evidently inseparable from the very nature of political authority; and all of them, from the mere necessity of the thing, were unhesitatingly assumed immediately after the emigration of the colonists, and continually exercised by them until the resumption of the first charter by king Charles II. The utter inadequacy of that charter to meet the exigencies of a provincial government would be sufficient in itself, if there were no other facts of the same import, to show that neither the crown-lawyers in framing, nor the grantees in accepting, such a charter, had it in contemplation to constitute a system of government for an extensive colony in parts beyond the sea. They simply entertained the idea, as we took occasion to observe in a former number,* of forming a trading and planting corporation. The very act of transporting the charter across the ocean was, in the opinion of Dr Robertson, if not a violation of the letter of the instrument, yet certainly incompatible with its spirit. The whole administration of provincial government itself was, therefore, in its very outset, as well as in its after course, an act of usurpation in respect of the prerogatives of the crown, and an evasion,—justifiable and necessary, we admit, but still an evasion,—of the laws of the metropolis. Bearing this circumstance in mind, we shall be prepared for what might otherwise occasion surprise, when we come to consider the multiplied and manifold violations of their charter in lesser particulars, which the colonists boldly ventured upon, in obedience to that unconquerable spirit of independence, which never ceased for a moment to be the darling object of their devotion, and the controlling principle of their lives.

The charter of Massachusetts vested the supreme authority in a governor, deputy-governor, and eighteen assistants,—all to be chosen by and from the freemen,—and in the freemen of the corporation themselves, who were styled the general court of the corporation;—a name, which our legislature has retained unaltered through all the changes which our government has since undergone. At the first general court, which was was assembled (October, A. D. 1630) the freemen voted, in violation of their charter, to delegate the legislative and executive powers to the court of assistants; but a few years

* N. A. Review, xv. p. 25.

afterwards (1634), when the freemen had become numerous in consequence of the influx of emigrants, they accomplished a complete revolution in the government by choosing deputies to represent them in the general court, and fixed the frame of government, as it continued, with slight variations, until the forfeiture of the colonial charter. Here, then, we find the germ of that system of elective representation, which, in its subsequent growth, has proved to be another of the most valuable of our political franchises. But the great moving principle in the minds of the colonists was most strikingly displayed by the regulation, adopted at a very early period, that they, and they only, who were members and communicants of some church in the colony, should be freemen of the corporation. This extraordinary law, which placed all temporal power ultimately in the hands of the clergy, and excluded a large portion of the inhabitants of the colony from any participation in the privileges of citizenship,* occasioned great complaints in England; on which account it was nominally repealed on the restoration of the Stuarts. The repeal, however, was artfully clogged with so many conditions as to render it wholly ineffectual, and such continued to be the sole qualification of a freeman so long as the government subsisted. The freemen assembled yearly for the choice of magistrates and deputies out of their own body, whom the law required also to be of orthodox principles in religion. The assistants were generally eight or ten in number, and the deputies two for each town, or one for every twenty corporators. The governor and assistants in one room, and the deputies in another, each body having a negative on the other's votes, constituted the legislative assembly. The governor had the power of calling the

* This appears to have been a distinction, however, that was not universally courted; for we find a law made in 1647, which recites that, 'Whereas many members of churches, to exempt themselves from public service, will not come to be made freemen, it is ordered that no members of churches within this jurisdiction shall be exempt from any public service they shall be chosen to by the inhabitants of the several towns,' &c. In the appendix to Hutchinson's History (v. i. n. 2 and 3) are two papers in which the reasons of this rule are discussed. Lords Say and Broke objected to it, that it would 'bring in papal excommunication,' that it would 'draw all things under the determination of the church,' that the state would lose the service of many men, who, though not religious, had 'eminent gifts of wisdom, courage,' &c. These objections were considered by the assistants and Mr Cotton. See on the subject Hutchinson v. i. pp. 222, 231, 233, 236, and the ap. ut supra. See also Colony Laws, c. 49.

general court together, but it was adjourned, prorogued, and dissolved by its own authority. The general court, and that body alone had power to enact laws, levy taxes, and grant proprieties in land; to coin money; to regulate the press; to erect corporations; to pardon sentenced convicts; and in general to exercise all other transcendent jurisdiction. It was also a court of appeals and review in the last resort. The governor acted as one of the assistants, excepting that, if the votes were equally divided, he was counted twice to produce a decision. The court of assistants, consisting of the governor, deputy-governor and assistants, composed the executive authority; they were a standing council of the colony in the vacations of the general court, with power to levy soldiers and otherwise provide for emergencies; and they were a judicial court for hearing civil causes of appeal and of divorce, and all criminal causes extending to life, member, or banishment.

Such as we have thus described it, was the simple form of the colonial government. Although it was not created at once and many portions of it were added from time to time, as the public need suggested the expediency of improvement in the original plan, yet in substance, in spirit, in general principles at least, if not in all its minuter details, it may be considered as the system which prevailed from the time when the colonists emigrated to this country, until their charter was taken away and the corporation dissolved.

Before proceeding to give an account of the laws, by which the rights of individuals were regulated under this system, we ought to state some facts connected with the compilation of those laws. The colonists, as we observed before, upon their arrival in America, very unceremoniously freed themselves of the burden of the English laws, notwithstanding the clause in their charter, which required that the laws of the colony should not be 'repugnant to the laws and statutes of the realm of England.' During the first three or four years after the arrival of the emigrants, justice was administered according to the sentiments of natural equity entertained by the judges, who had recourse to no authority but the Mosaic law, to which they conformed in all cases where they could wrest it into any real or imaginary application to the circumstances of the colony. Hutchinson records some very characteristic instances of the rude and simple justice of our forefathers in the

period of our national infancy.* But as the settlements became more extensive, the necessity of a firm and stable system of laws urged itself more forcibly upon the colonists, and committees, consisting of the principal persons of the clergy and laity were appointed from year to year to frame a suitable code.† While this was in preparation, such laws were occasionally enacted as could least be dispensed with, and in 1648 the whole compilation was completed and promulgated under the direction of the general court. In presenting our readers with a review of the contents of the code, we shall, for the sake of perspicuity, arrange our comments in that order, which, notwithstanding its want of logical exactness, has acquired a prescriptive authority in jurisprudence, beginning with the laws relating to the rights of persons in their respective relations in society, then proceeding to the laws regulating the tenure and transfer of property, next considering the course of judicial proceedings, and concluding with the subject of crimes and their punishment.

I. We have already mentioned the means of acquiring the rights of a corporator; and although personal security was extended to all residents within the jurisdiction of the colony, yet church-members alone were freemen; and they so united themselves, by oath, to each other and the state, that the consent of the whole was necessary to effect a separation. Every person was guarantied the unimpeached enjoyment of all his legal liberties, privileges, and immunities; nor could he be restrained in person or property, unless 'by virtue of some express law of the country, warranting the same,' says the act, 'or in case of the defect of the law, in any particular case, by the word of God.' The strict puritanical character of the laws, however, confined the rights of the colonists within a narrow compass, as we shall see hereafter; and no

* 'Josias Plaistowe, for stealing four baskets of corn from the Indians, is ordered to return them eight baskets, to be fined five pounds, and hereafter to be called by the name of Josias and not Mr, as he used formerly to be.'—Hutchinson, ch. v.—'Robert Shorthose, for swearing by the blood of God, was sentenced to have his tongue put in a cleft stick and to stand so for the space of half an hour.' Ibid.

† The model or first draft, from which this code was prepared, is preserved in Hutchinson's Collect. p. 161, and in Mass. Histor. Collect. v. p. 173. It was written by the famous Cotton, and is a signal instance of the extravagant excess to which superstition was carried in that age. Mr Cotton intended that the government should be a pure theocracy.

person could leave the limits of the patent without permission of a magistrate. Slavery also was recognized by law, and that not only in the persons of captives taken in war, or sold in the colony, but in the odious form of bond-service for the payment of debts; for an insolvent debtor might be sold into servitude at the requisition of his creditor. There were no established distinctions of rank among the freemen other than such as the exercise of elective magistracies created; but these were scrupulously observed, in obedience to the austere spirit of a religious commonwealth.

The congregational was the established form of church government, in nearly its present constitution; each church having intrinsic powers for the choice of officers, and other interior regulations; subject, however, to the control and exercise of the secular authority; for if any church selected preachers offensive to other churches or to the general court, or neglected its minister's maintenance, in both these cases the general court or assistants interposed to enforce the laws. Synods were occasionally assembled, in which the magistrates assisted 'not only to hear, but to deliberate and determine;' but these synods could 'exercise,' says Burke, 'no church censures by way of discipline, nor any act of church authority or jurisdiction.'* Still the clergy possessed a less obtrusive, though equally effectual power in civil affairs by means of the deference and veneration of the people.

The system of organizing the militia, which now exists in Massachusetts, likewise had its origin under the colony government; for the colonists living at this time in the midst of warlike tribes of savages, who were kept in a state of constant irritation and hostility by the intrigues of the French in Canada, the most severe discipline was absolutely essential to the very being of the colony. At first, every male person, with some few exceptions, was required to appear in arms once in each month, which was afterwards reduced to six days in the year. Every inhabitant was obliged to furnish himself with arms and ammunition, except magistrates, elders, and the officers and students of Harvard College. The officers of the companies were chosen by the companies respectively; and the superior officers by the freemen and householders within the districts which their commands embraced.

* European Settlements in America, v. ii. p. 148.

Beside the civil division of the colony into counties, in imitation of the mother-country, the inhabited territory was subdivided into towns with the unostentatious municipal magistracy of a small number of *select-men* annually chosen out of the body of the inhabitants, in that manner which still remains among the peculiar institutions of New England. As a portion of the country became settled, the inhabitants, within certain prescribed boundaries, were constituted a corporation with perpetual succession, and with the usual corporate powers requisite for managing the affairs of similar communities. While these miniature states, whose concerns were regulated in meetings of the inhabitants, and which were of course pure democracies in constitution, served, on the one hand, to nourish and foster in the breasts of the colonists a spirit of republican independence, on the other hand, they relieved the general court from the task of assessing and diffusing the most burdensome of the public charges, namely, those for the support of the poor, of schools, and of the highways.

The colonists regarded matrimony as a civil contract exclusively; and in conformity with this idea, marriages were universally solemnized by the magistrates. Hutchinson conjectures that this remarkable departure from the principles of the laws of England was suggested by the Scottish law, which gives the same authority in this respect to the magistrates,* and from which our ancestors copied many of the peculiarities in their political institutions. All marriages, as well as births and deaths, were recorded; and no parties could be married, without the consent of their parents, nor before their intention had been duly published by being posted up in certain public places for fourteen days, or declared at three several church-meetings. Adultery, cruel usage on the part of the husband, and desertion for a year or two were considered adequate causes of divorce; but they abolished the distinction of divorces made by the canon law, all sentences of divorce dissolving the bonds of matrimony.

The obedience of children to their parents was severely enforced, for a stubborn and rebellious child was punishable with death. All children were taught to read, catechised, and otherwise instructed in their families, the selectmen being

* Erskine's Scottish Institute, p. 64. Hutchinson, c. 5.

bound to execute the laws to that effect. But above all, we should notice the circumspection and liberality of the colonists as displayed in their laws for the support of public schools, one of which every town containing fifty householders was bound to maintain. Thus early were laid the foundations of that system of primary education, which, by disseminating a spirit of industry and intelligence through all classes of society, has contributed, perhaps more than any other single cause, to confirm and perpetuate the peculiar character of the inhabitants of New England.

II. The patent of the colonists prescribed that their lands should be holden of the king and his successors as of their 'manor of East Greenwich in Kent in free and common socage, and not in capite nor by knight's service;' which clause in the charter was undoubtedly intended to refer simply to the *tenure* of the lands *as respected the king*, without drawing along with it all the properties of gavelkind-lands in Kent. But happily it was interpreted in a larger sense than the charter strictly warranted; for our ancestors had a great talent for detecting those constructive powers, which our Virginian brethren so zealously deny in the National Constitution; and to this we are to attribute the liberation of the colony from the burden of the feudal tenures. Hence, agreeably to the custom of gavelkind, and in contradiction to the common law, they admitted no forfeiture of estates for felony; nay, they went farther than gavelkind itself; for they suffered traitors, according to Hutchinson, no less than ordinary felons, to devise their lands after sentence; and if a convict died intestate, distribution was made as in other cases.* The rules of descent were very peculiar, entailed estates following the common law, but estates in fee-simple descending to all the children alike, except that the eldest son had a double portion in conformity with the institutions of Moses.†

Two very important variations from the principles of con-

* The maxim of the custom of gavelkind is, 'the father to the bough and the son to the plough.' St Germ. D. and S. c. 10. But this did not apply to treason, which always wrought a forfeiture. Tomlin's Jacobs, v. iii. p. 111 and 178. See also Robinson's Common Law of Kent, p. 227.

† Col. Laws, c. 104; Robinson's Gavelkind, p. 9; Hale's His. Com. Law, c. 11; Deuteronomy, xxi. 17.

veyancing at the common law, which still subsist among us, were introduced at this time, namely, the requisition of an acknowledgment and registry of deeds, and the permission given to married women to aliene lands. In 1641 it was ordained that no grants, sales or mortgages of land, where the grantor continued in possession, should be in force, except against the grantor and his heirs, unless the same was acknowledged before some magistrate and recorded; and in 1651 another ordinance provided that no alienation of lands should be valid, unless by deed executed with livery and siesin, without acknowledgment and registry of the deed. Previously to these acts, the delivery of a deed was sufficient in the colony to pass real estate, as the English statute of enrolments was held not to extend to this country.*

With respect to the power of wives to join with their husbands in conveyances, there was a special ordinance authorizing a feme covert to bar herself of her dower; but the ordinance did not extend to enabling her to aliene estates held by her in her own right. The usage, however, prevailed in the colony, difficult, as our courts have since declared it is, to ascertain the origin of the usage, or to place its legality on any other ground than that of the common law of New England.†

III. The administration of justice in the colony was conducted with extreme simplicity, and with a disregard of forms, which could not have been borne in a community differently constituted. The judicial power, both in criminal and civil matters, was originally exercised by the court of assistants; but afterwards, when the colony was divided into counties, county-courts were holden in each county, by magistrates or other persons, nominated by the freemen and approved by the general court, to the number of five, any three of whom, a magistrate being one, were a court with power to hear and determine all civil causes, and all criminal causes not extending to life, member, or banishment. High criminal causes, as we have seen, were cognizable only by the magistrates, to whom, also, an appeal lay in civil causes, and from the magistrates to the general court. There were no justices of the peace according to the usual signification of the terms, but the

* Mass. Rep. iv. 544; Ibid. v. 473; Ibid. vi. 26; Col. Laws, c. 28; Hutchinson's His. i. 455.

† Mass. Rep. vii. 2.

assistants individually exercised most of the functions of justices of the peace. These courts had cognizance of all causes of whatsoever name or nature, whether properly of common law, civil, equitable, or ecclesiastical jurisdiction; and however inadequate such tribunals might be to execute the laws in a less primitive community, they sufficed for the wants of our simple forefathers.*

The judicial proceedings were as summary as could consist with the preservation of any kind of method in the course of law. The parties had a right to take their election of having a trial either by the bench or by a jury. Jurors were chosen by the votes of the freemen. They could ask advice of any person present, if they were not decided in their own minds; and so far were they from being confined to the question at issue in returning a verdict, that, in criminal cases, they sometimes found as their verdict that there was strong reason for suspicion, but not enough for conviction, and the court modified their sentence according to such a verdict. No special pleadings or demurrers were admitted; and no summons, plea, or other process could be abated for any circumstantial errors, provided the cause was rightly understood.

The process in actions was either by summons or capias, at the plaintiff's election, both conceived in the most concise and laconic terms imaginable; and what is worthy of notice, as indicative of the republican temper of the times, no writs, indictments, or other legal proceedings ran in the king's name, or contained the slightest allusion to the authority of the sovereign. The plaintiff might either hold the defendant to bail, or attach his property; and the attachment held good until thirty days after rendition of judgment. If the judgment-creditor could not find goods to satisfy his execution, he might, as we stated in another place, levy it on the body of the debtor, who was then compelled to discharge it by bond-

* The remarks of judge White, in his unpretending but valuable work on the Probate Law of Massachusetts, are applicable to this point. 'Though familiar,' he says, 'with the distinction between the civil and ecclesiastical jurisdiction in England, they were never inclined to introduce it here; nor would the constitution of their churches have admitted it. The leaders among them were wise and practical men, and well understood how to adapt their laws and institutions to the condition of a new and growing settlement, and to vary and extend them, as their experience dictated, without transplanting more from the parent country than was applicable and useful.' p. 9.

service; so harsh and severe have always been the laws enacted for the collection of debts, even among the most civilized people, and at the most refined ages, of the world.

One thing else under this head may be mentioned, as a very remarkable practice introduced at this time, and handed down to us from our ancestors, although without having been either established or perpetuated by any statutory provision. We allude to the form of swearing by holding up the right hand, instead of kissing the book, or laying the hand upon it, which the scrupulous colonists, in common with the Scottish covenanters, regarded as an idolatrous and superstitious ceremony. No particular form of administering judicial oaths was ever required in England any more than in Massachusetts; but the usage of touching or kissing the evangelists prevailed so universally in the former country, that the books refer to two cases only, one in 1657 and the second in 1745, in which witnesses were permitted to hold up the hand, and which were recorded on account of their singularity. The latter form, however, has such decided advantages over the former, that we have great cause to rejoice in the exchange, as giving us a ceremony which is more simple than the English, more impressive, in far better taste, and much more solemn, in the opinion of so competent a judge as lord Mansfield.*

IV. The criminal laws of the colony remain to be considered; and these we may pass lightly over, since, while they constitute one of the darkest features in the civil polity of our sires, there now continue but few and faint traces of them in the existing codes of the New England states. Regardless of the principle of the common law to which they were pledged to adhere, blind to the situation and emergencies of the country and of the times, alike unmindful of the dictates of reason and the voice of experience, the colonists enacted a system of vindictive and sanguinary penal jurisprudence, which finds a parallel in no code of modern days, and in but one of all the numberless diversified codes of antiquity. Beside most of the crimes

* As to the introduction of the usage in the Colony, see Hutchinson, ch. 5. The cases referred to in the text are that of Dr Owen in Siderfin's Reports, v. ii. p. 6, and of a Covenanter mentioned by lord Mansfield in Cowper's Reports, p. 390. See also Willes' Reports, p. 553; Paley's Philosophy, p. 145; and Tombes on Oaths, l. v. s. 1, for more information on the same subject.

capitally punished by the common law, our forefathers added, to the gloomy catalogue, idolatry, witchcraft, blasphemy, adultery, man-stealing, cursing, smiting or rebelling against a parent, and heresy,—offences, some of which more enlightened legislators have since expunged from the statute book, while to the rest they have annexed punishments more appropriate to their rank in the scale of criminal enormity. The singular inconsistency of these laws, which, under a regal government, altogether omitted the crime of high treason, and punished heresy with death in a community established for the sole purpose of vindicating the rights of conscience, may be accounted for by the circumstance that the colonists conceived themselves bound to revive and follow implicitly all the peculiarities of the Mosaic institutions. With a fond extravagance in simplicity, which may now excite our amazement, they regarded the laws of Moses, not as the temporary polity of a corner of Asia, which divine revelation had abolished sixteen centuries before, but as the eternal, immutable, and indispensable decrees of God, irrevocably binding upon all succeeding ages and in every clime of the habitable globe.*

The colony-laws specified a great number of lesser offences, which it is unnecessary for us to enumerate, observing only that many of them strikingly indicated that over-zealous desire to exact the observance of minute and trivial things, which has exposed the puritans to so much ridicule from the less scrupulous among their contemporaries and successors. In the kinds of their punishments, too, they displayed little of the spirit of improvement so characteristic of other portions of their ordinances. They transferred to their adopted country the stocks, the pillory, and the whipping-post of their native land; nay, one of their acts authorized the application of torture to discover the accomplices of a convict, provided, subjoined the well-meaning legislators, that the torture be not '*barbarous and inhuman;*' so little progress had at that time been made in the difficult and embarrassing science of penal jurisdiction.

* Col. Laws, c. 18; Hutchinson's His. i. 440. The texts of the Pentateuch are printed against each law in the penal title. Col. Laws, *ut supra*, and Adv. to edit. 1814; Mather's Magnalia, v. 20; Minot's Continuation, i. 24. The original draft reported by Mr Cotton was much more merciless than the above. See Mass. His Col. 1798, p. 182.

We said that the crime of heresy was punished, in the colony, with death. The remark needs to be qualified and explained. The regulations that church-members alone should be freemen, and that all high offices of trust or honor should be reserved for orthodox congregationalists, would appear, at the present day, to be a sufficiently harsh denunciation of the doubtful crime of heresy. But it seemed far otherwise to our progenitors; for, by the acts against heresy, the opposing of certain dogmas, therein mentioned, and the denial of any of the canonical books of the old or new testament, were punished with fine, whipping, and banishment. In addition to this, all catholic priests and all quakers were banished from the jurisdiction, punishable with death if they returned; and the least intercourse with quakers was forbidden under the heaviest penalties. The injudicious execution of these laws in several instances, while it exposed the conduct of the colonists to such severe examination in England as resulted in the forfeiture of their chartered privileges, and in the formation of a government less independent of the crown, afforded a striking example of the doctrine since laid down by Montesquieu; 'que toute religion réprimée devient elle-même réprimante.' The settlers of Massachusetts did not fly to the deserts of the new world, like Penn and his followers, to found there a commonwealth on the broad basis of universal toleration; but it was to withdraw themselves out of the reach of an oppressive hierarchy, and to admit none to a fellowship of interests with them, who were not impelled by their own stern and inflexible principles; and to such alone did they proffer an asylum from persecution in New England.

If our readers have followed us thus far, they will now be prepared to apply the remarks, which we made in a former part of this article, as to the source of our peculiar laws. And when they advert to the defects in the system of jurisprudence just described, defects, too, so numerous and so radical, we think they will agree with us in the opinion that the social order could not have been preserved entire by means of the colony-laws, if their operation had not been aided by the exalted sense of duty, the unwavering obedience to the dictates of conscience, which elevated and directed the actions of our ancestors.

All these laws were virtually abrogated by the seizure of the colony-franchises into the hands of the king in 1688, and the grant of a new charter, vesting the appointment of a governor in the king, and making it necessary that all acts of the general court should receive the king's approbation, before they enjoyed the force of statutes. Under this charter the municipal laws of the colony were gradually enlarged, the outlines already traced were filled out into the proper consistency and finished form requisite for the occasions of a populous state, many of the harder features of the original were softened down beneath the influences of a more tolerant spirit, and the whole was assimilated, in substance, to what we now find prevailing under the constitution of Massachusetts.

To attempt the task of continuing the history of our law to the present moment would be greatly exceeding the reasonable limits of a review. It is not our aim to give an abridgment of the statute-book or a digest of the reports. But while upon this subject of the peculiarity of our laws, we would not lose the opportunity of referring, before we conclude, to a work, which, as we conceive, will go far towards creating a new era in our judicial history. We allude to the Digest of American Laws proposed for publication by Mr Dane of Beverly. The name of this gentleman, closely associated, as it is, with the political and constitutional history of our country, has no less distinguished claims to eminence in connexion with our municipal law. In saying this, we do not confine ourselves to the considerations, that his collection of American precedents has been a standard law-classic in this country for twenty years, and that he has devoted the leisure of twice that period to the preparation of his Digest. Mr Dane's title to the respect of the profession rests on still higher grounds. He is one of the few surviving luminaries of that constellation of legal sages, who illustrated the bar and bench of Massachusetts in the periods immediately succeeding the revolution. Who, then, so able to combine and digest the elements of our law as he, beneath whose eye it has grown up into the complete proportions of its present maturity? Who so capable of penetrating and developing its principles, as this venerable monument of those days when there were giants in the land? Who so familiar with the whole theory

and practice of it, as one, who was not only the coadjutor of the Reads, the Trowbridges, the Cushings, the Danas, the Parsonses, and the Sewalls of the generations that are gone by, but the contemporary likewise of those, who now inherit their fame and rank in the courts of Massachusetts and the union?

Art. V.—1. *Versuch über den politischen Zustand der Vereinigten Staaten von Nord America, &c. von Frederic Schmidt.*

Essay on the political condition of the U. S. of North America, by Frederic Schmidt. First volume, 8vo. Stuttgart and Tübingen. 1822.

2. *Meine Auswanderung nach den Vereinigten Staaten in Nord America, &c.*

My emigration to the U. S. of N. America in the Spring of 1819, *and my return home in the winter of* 1820. By Ludwig Gall. 2 vols. 8vo. Treves. 1822.

Our readers will give us credit for having devoted a fair proportion of our pages to the literature of Germany, and we may appeal to their recollection that we have done ample justice to the value of its language and the intellectual stores deposited in it. A new species of German literature, however, is growing up, for which we cannot promise so much. In our number for July, 1820, we gave a brief account of a specimen of it, 'the German in North America,' of the baron von Fürstenwärther, not at that time foreboding that the noble baron's brief essay was to serve as model for a new class of writers, on our country. It is not often that the progress of improvement is more rapid, than it has been in the baron's school. It may be truly said that the little finger of Mr Frederic Schmidt or of Mr Ludwig Gall is thicker, than the baron von Fürstenwärther's loins. The two works before us will compare advantageously with the happiest efforts of Beaujour or Fearon; and the Germans have so often been the butt of other nations, that it gives us pleasure to see them at last acting vigorously on the offensive, though it happens to be against the nation, which has given them least provocation. It is very far from our intention to enter the lists with either